June 14, 2020

AGC of America's Analysis of the INVEST in America Act *(as introduced)*[1]

Introduction

On June 3, 2020, the House Committee on Transportation and Infrastructure (T&I Committee) Chairman Peter DeFazio (D-Ore.), released his proposal to reauthorize federal surface transportation programs, **the INVEST in America Act**, absent bipartisan input. The bill provides $494 billion over five-years to improve the nation's highways, bridges, public transit systems, and passenger rail systems. Approximately, $411 billion of that amount is derived from the Highway Trust Fund (HTF). The remaining funding is authorized to be appropriated from the General Fund of the U.S. Treasury and would be subject to appropriations. T&I Committee Republicans are expected to release their own version of a surface transportation reauthorization bill in the coming days. Additional details on the Republican bill will be provided once they are available.

Chairman DeFazio's bill tracks closely with principles and funding levels in the **Moving Forward for America Framework** (Framework) released by House Democrats in January. The Framework provides $760 billion over five years to improve various types of infrastructure. The T&I Committee is scheduled to consider amendments to and passage of the bill on Wednesday, June 17. Following passage in the T&I Committee, the full House of Representatives could amend and vote on the bill prior to July 4.

Below, AGC lays out its analysis of the 864-page bill (as introduced) in the following manner.

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[1] On June 3, 2020, House Transportation and Infrastructure Committee Chairman Peter DeFazio introduced the INVEST in America Act. The bill is anticipated to amended as it moves forward in the legislative process. AGC will update this document to reflect notable changes applicable to the construction industry.

I. Investment and Policy in Surface Transportation Programs

A. Special Treatment for Fiscal Year 2021

In response to the COVID-19 pandemic, the bill includes a relatively "clean" extension of the Fixing America's Surface Transportation (FAST) Act for fiscal year 2021. The extension does not include passenger rail programs. Additionally, funding for that fiscal year is available at a 100 percent federal share. The bill does modify certain provisions in the FAST Act, such as evaluation criteria for grant applications under the Nationally Significant Freight and Highway Projects Program; and allowing Capital Investment Grant Program projects to receive a higher federal share to address decreases in state and local revenues that would have been dedicated to those projects. The bill also provides approximately $22 billion to state departments of transportation (DOTs), public transit agencies, and other public entities for certain existing eligibilities as well as new eligibilities such as an entity's salaries and benefits and operating expenses.

B. Highways

The bill provides $319 billion for fiscal years 2022 through 2025 for the Federal-aid Highway Program (Highway Program). Of that amount, approximately $294 billion is provided for the formula programs. The remaining amount is provided for the administrative expenses of the Federal Highway Administration (FHWA), allocated programs (e.g., Tribal Transportation Program), competitive grants programs, and research programs. While the funding amount is significant, the bill seeks to fundamentally transform the Highway Program through a series of policy and programmatic changes, which are discussed in this section and the other sections that follow.

i. Restricts Expanding Highway Capacity in the Highway Program

The bill predominately focuses on a "fix-it-first" approach for the surface transportation system, seeking to bring it into a state of good repair. As a result, the bill places restrictions on or excludes eligibilities for expanding the capacity of highways. For example, the bill:

- Places restrictions on when a state can build additional highway capacity under the National Highway Performance Program (NHPP). Under current law, the NHPP is a core formula program within the Highway Program that focuses on reconstructing and adding additional capacity to segments, bridges, and tunnel on the National Highway System, which includes the Interstate System;
- Requires state DOTs to set targets for new performance measures related to reducing greenhouse gas emissions and improving transportation system access;
- Limits state DOTs ability to transfer funding within the Highway Program; and
- Refines existing and imposes new restrictions on how state DOTs can use their funding should they fail to achieve certain outcomes.

ii. Expands and Creates Eligibilities for Non-Highway Projects in the Highway Program

Under current law, there are eligibilities for public transit projects and multimodal freight projects within the Highway Program. The bill would significantly increase those eligibilities under current and new programs and create new eligibilities for intercity passenger rail (e.g., Amtrak) projects. As examples:

- The FAST Act created the Nationally Significant Freight and Highway Projects Program known as INFRA, which is a competitive grant program focused on funding nationally and regionally significant projects. The bill completely revamps this program and notably, makes public transit projects and intercity passenger rail transportation projects eligible for a grant;

- The bill also provides opportunities to fund intercity passenger rail projects within the Highway Program.
- Currently, the Highway Program provides limited eligibility for operating expenses. The bill, however, expands the existing eligibility and creates additional eligibilities for operating expenses of public transit systems and passenger rail systems. The new Carbon Pollution Program, which seeks to reduce greenhouse gas emissions from the surface transportation, would allow a state DOT to spend up to 10 percent of its annual funding on the operation expenses of an eligible public transit system and intercity passenger rail project; and
- Under current law, a state DOT could spend up to 10 percent of its annual funding for the National Highway Freight Program on certain multimodal projects. Under the bill, this 10 percent cap is eliminated, but requires that the funding only go to those elements that provide public benefits.

iii. Creates Structural Changes to the Highway Program

Previous federal surface transportation laws sought to consolidate existing federal surface transportation programs and limit the establishment of new programs in order to provide state DOTs with additional flexibility to address their unique needs.

This bill breaks with that recent practice and creates several new formula programs and competitive grants programs. These programs are focused on addressing various policy priorities, including building more resilient infrastructure, reducing greenhouse gas emissions, and providing electric vehicle charging and hydrogen fueling infrastructure. Some of these programs will be discussed in greater detail in the other sections that follow.

iv. Establishes New Vehicle Miles Traveled (VMT) Pilot Programs

The FAST Act authorized up to $20 million per fiscal year for a pilot program to provide grants to states to demonstrate user-based alternative revenue mechanisms to ensure the long-term solvency of the HTF. Since then, FHWA has funded a number of state and regional pilot programs aimed at developing various systems to collect vehicle miles traveled (VMT) fees as a replacement for the state fuel taxes. The information generated by these pilot programs could then be used at the federal level to potentially replace federal fuel taxes.

This bill builds upon the FAST Act by adding additional reporting requirements for FHWA, expanding the scope of the programs to test "solutions to ensure the privacy and security of data collected," allowing the funding to be used for implementation of VMTs (i.e., not just testing), and increasing the federal share for pilot projects from 50 percent to 80 percent.

Additionally, the bill creates a nationwide pilot program to "demonstrate a national motor vehicle per-mile user fee to restore and maintain the long-term solvency of the Highway Trust Fund." The program would charge volunteers (from both commercial and passenger vehicles) a VMT fee that is equivalent to the amount of gas or diesel taxes paid by an average user, and then issue them a quarterly refund of any gas or diesel taxes paid.

The creation of a nationwide VMT pilot program has been a priority for AGC as Congress continues to stall on increasing the federal fuel taxes, or otherwise explore sustainable revenue options for a long-term fix to the HTF.

C. <u>Public Transit</u>

The bill provides $105 billion for fiscal years 2022 through 2025 for federal transit programs. Of that amount, approximately $73 billion is provided for the transit formula programs. The remaining amounts are provided for the administrative expenses of the Federal Transit Administration (FTA), competitive grant programs, and research programs.

Unlike the Highway Program, the bill does not seek to fundamentally transform federal transit programs. Instead, the bill significantly increases funding, makes more surgical policy and programmatic changes, and establishes a few new programs. As examples, the bill:

- Modifies the approval process for public transit capital project seeking grant under Capital Investment Grant Program to reduce the burden on eligible entities;
- Refocuses the competitive grant component of the existing Buses and Bus Facilities Program on bus facilities and fleet expansion projects;
- Strengthens the Buy America projects for public transit projects by closing loopholes and incentivizing the use of increased domestic content among other provisions. The bill establishes a competitive grant program to increase the frequency and ridership of public transit buses; and
- Includes provisions to address the issues facing frontline transit workers, focus on transit-supportive communities, increase the resiliency of the public transit systems, and support all users of public transit.

D. Passenger Rail

The bill provides $60 billion for fiscal years 2021 through 2025 to improve the passenger rail system, subject to the availability of appropriations. None of the funding for these programs is derived from the Highway Trust Fund. However, recall that the bill makes intercity passenger rail projects eligible under the Highway Program. Of that amount, approximately $30 billion is provided to Amtrak, which is then further divided between the Northeast Corridor and the National Network. The remaining amount is provided to existing and new grant programs, research programs and studies, the Federal Railroad Administration for operating and safety activities, and the Office of the Inspector General. The bill establishes a new competitive grant program to improve the state of good repair, operational performance, and growth of intercity passenger rail. It authorizes approximately $20 billion for fiscal years 2021 through 2025 for this program.

II. Construction Workforce Initiatives and Related Policies

A. Workforce Access and Training

The bill tasks the U.S. Department of Transportation (USDOT) and state DOTs with several new requirements and obligations to address workforce and training issues in the surface transportation industry, including:

- Increasing access to jobs in the sector for women and minorities; and
- Establishing a *Task Force on Developing a 21st Century Surface Transportation Workforce* that seeks to bring industry, labor, and government together to evaluate current and future workforce needs and further develop educational pathways for students to pursue careers in the industry.

B. Hiring Preferences

The bill reinstates a pilot program to allow recipients of funding to utilize social and/or economic contracting requirements in order to evaluate the impacts to the competitive bidding process. The pilot program will focus on local or other geographic labor hiring preferences, economic-based labor hiring preferences (i.e., low-income workers) and labor hiring preferences for veterans.

C. Disadvantaged Business Enterprises

The bill makes no changes to the existing Disadvantaged Business Enterprise Program.

D. Commercial Truck Driver Hours of Service Rule

In May 2020, the Federal Motor Carrier Safety Administration (FMCSA) released the final hours of service rule to improve the safety of the nation's roads and increase flexibility for truck drivers. The final rule makes changes to the four provisions: the short-haul exemption; adverse driving conditions; the 30-minute break; and split-sleeper berth. The final rule is set to take effect at the end of September 2020. However, the bill would delay the effective date until 60 days after the Secretary of Transportation submits to Congress the results of a comprehensive review of federal hours of service rules. Among other things, the comprehensive review will include a safety impact analysis and a driver impact analysis.

E. Buy America

The bill requires the USDOT to make a determination on a request for a waiver from Buy America requirements within 120 days of receipt when such a request seeks the waiver because: (1) it is in the public interest; or (2) such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality transparent public process before waiving Buy America requirements. The USDOT must provide public notice of, seek public comments on, and respond to those comments in a detailed justification on the agency action taken on the request for a waiver. The USDOT would also have to reevaluate any standing nationwide waivers every five years, including the manufactured products waiver, to determine whether those waivers remain necessary. For construction contractors this process could impede reasonable requests for waivers during a time when such waivers are rarely granted.

III. Environmental Initiatives & Regulations

A. Climate Change

As previously discussed, the bill tracks closely with the principles and funding levels included in the Framework. One of the principles is mitigating the impacts of climate change, including addressing carbon pollution from the surface transportation system. The bill includes a significant number of funding, policy, and programmatic changes to achieve this principle some of which have been previously discussed in this analysis. Examples of this include:

- Authorizing record levels of investment for public transit and passenger rail systems not only through new and existing federal transit and passenger rail programs, but also by incorporating and expanding eligibilities for such projects within the Highway Program;
- Providing increased eligibilities to fund the operational expenses of public transit and passenger rail systems, including within programs that receive funding from the HTF. These eligibilities are provided in part to further address the impacts of climate change;
- Increasing funding for bike and pedestrian projects through new and existing programs;
- Limiting the ability for state DOTs to carry out highway capacity projects under the NHPP and fails to make such projects or other projects that may increase the number of single occupancy vehicles eligible under certain new programs;
- Establishing a greenhouse gas performance measure and requires states to set targets for that performance measure. States are prohibited from setting regressive targets;
- Funding for the installation of electric vehicle and hydrogen charging infrastructure to facilitate more acceptance and use of these vehicles; and
- Incorporating eligibilities for projects that improve the resiliency of or reduce the greenhouse gas emissions of the surface transportation system into existing programs and establishes new programs solely focused on improving the resiliency of or reducing the greenhouse gas emissions of the system.

The bill weaves climate change and resiliency through the national goals for surface transportation programs as appropriate and incorporates climate change and resiliency into the planning requirements for state DOTs and metropolitan planning organizations. This will create a lasting impact on how these entities identify and select projects to receive federal funding in the future; and will similarly impact how contractors bid and deliver such projects.

B. Innovative Materials

The bill includes provisions to research and encourage the use of innovative materials, especially those materials that facilitate a reduction or sequestration of greenhouse gas emissions. Within the Highway Program, projects that utilize an innovative material are eligible for a higher federal funding share, thereby incentivizing their use by state DOTs in contract specifications. There are no contractor installation protections for the failure of innovative materials to perform as advertised. Additional provisions are discussed in the analysis on federal research programs below.

C. The Environmental Review and Permitting Process

Recent surface transportation laws have included provisions to streamline the environmental review and permitting process for highway, bridge, public transit, and passenger rail projects. However, this bill does not include any significant provisions to streamline the environmental review and permitting process. The bill does codify the FHWA's existing Every Days Counts (EDC) Initiative through which FHWA and other public and private partners identify and deploy innovative practices and products that expedite project delivery process, improve environmental sustainability, and enhance roadway safety, among other items. The bill requires FTA to establish its own EDC initiative.

IV. Project Delivery & Safety

A. Special Experimental Projects

Under current law, FHWA has the authority to undertake special experimental projects (SEP). FHWA has utilized this authority to evaluate methods for expediting projects delivery and non-traditional contracting practices as well as delegate certain federal programmatic responsibilities to state DOTs. The bill requires FHWA to allow public notice and comment on a letter of interest that seeks to undertake a SEP and requires FHWA to provide Congress with a report on the SEPs that were carried out as well as any legislative recommendations based on the findings of those SEPs. While this requirement will provide more transparency for SEPs, it may also slow down the use of these authorities, which have generally helped improve the efficient and effective use of federal funding.

B. Safety

As with previous surface transportation laws, improving the safety of the surface transportation system is a central principle for this bill. The bill increases funding for existing highway safety programs administered by FHWA and the National Highway Traffic Safety Administration. The bill includes new provisions to address roadway safety issues in both urban and rural areas. Some of these measures seek to alter the project design and planning process to ensure roadways are safer and more accommodating to all potential users.

New safety provisions in this bill include:

- Increasing the existing High-Risk Rural Roads special rule to direct more funding for safety projects in rural communities;
- Adopting "context sensitive design principles" that seek to incorporate the accommodation of all roadway users and their safety in the planning, design, and development of new facilities. This is more commonly known as developing "complete streets;"

- Providing more design flexibility to local governments;
- Allowing states to use Surface Transportation Workforce Development, Training, and Education funding for work zone safety training and certification that includes construction workers;
- Creating a vulnerable road user safety special rule, requiring states with high rates of cyclist and pedestrian fatalities to use their funding to address safety hot spots in the specific areas of the state in which large numbers of fatalities occur;
- Allows a state to use up to 10 percent of certain funding for non-infrastructure related safety projects and research; and
- Requiring coordinated bicycle and pedestrian safety planning and ensures that states with the highest pedestrian and bicycle fatalities take steps to address those risks.

V. Technology, Research, and Development

The bill creates new and modifies existing transportation research and development programs. The research programs are funded out of the HTF and the bill increases the annual funding spending level from $420 million to $545 million.

A primary focus of the bill is to add, as a point of emphasis for many USDOT research programs, research into ways to mitigate greenhouse gas emissions. For example, under current law, the primary purposes of USDOT's strategic research and development plan are:

- Improving mobility of people and goods;
- Reducing congestion;
- Promoting safety;
- Improving the durability and extending the life of transportation infrastructure
- Preserving the environment; and
- Preserving the existing transportation system.

This bill would amend these purposes by adding two new sections on "reducing greenhouse gas emissions," and "developing and maintaining a diverse workforce in transportation sectors." By formally adding a focus of "reducing greenhouse gas emissions" in this and many other research programs, it is concerning that this may come at the expense of research and development on programs to increase mobility or promote safety. Additionally, it is an open question as to whether the USDOT is the agency best equipped to deal with research into reducing greenhouse gas emissions.

Some other notable provisions in the bill include:

- <u>Materials to Reduce Greenhouse Gas Emissions Program</u>. The bill would create a new research program at USDOT to "award grants to eligible entities to research and support the development of materials that will reduce or sequester the amount of greenhouse gas emissions generated during the production of highway materials and the construction of highways." AGC has expressed concerns about the use of "innovative materials" and whether contractors have any potential product performance liability when installing novel construction materials over the lifecycle of the assets.

- <u>Study on Safe Interactions Between Automated Vehicles and Road Users</u>. The bill would fund a study "on the ability of automated vehicles to safely interact with other road users," which would include workers in roadside construction zones. A working group to assist in the development of the study would be established, which would notably include a representative from the "road construction industry." Ultimately, this provision would provide additional research into the interaction between automated vehicles and workers at construction sites, and, potentially, ways to mitigate any risks to construction workers from automated vehicles.